LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
APR 29 1949
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1948
No. 506

UNITED STATES OF AMERICA, ex rel. May Johnson,

Petitioner,

against

EDWARD J. SHAUGNESSY, Acting District Director of the Immigration and Naturalization Service in the New York District, or such other person, if any, who may have the custody of May Johnson,

Respondent.

PETITIONER'S REPLY MEMORANDUM

GUNTHER JACOBSON,
Attorney for Petitioner.

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y. 7, BARCLAY 7-0349

Supreme Court of the United States

October Term, 1948

No. 506

UNITED STATES OF AMERICA, ex rel. May Johnson,
Petitioner,

against

EDWARD J. SHAUGNESSY, Acting District Director of the Immigration and Naturalization Service in the New York District, or such other person, if any, who may have the custody of May Johnson,

Respondent.

PETITIONER'S REPLY MEMORANDUM

Mr. Justice Frankfurter, at the end of the argument herein, referred to the Senate committee report on the immigration bill which became the 1917 Act, H. R. 10384, and to the language with respect to Section 17 of the bill (S. Rep. 352, 64th Cong. 1st sess., p. 15), reading:

> * * * Section 10 of the act of 1907, making the certificate of the examining medical officer and the decision of a board of special inquiry based thereon conclusive and final in certain cases of disease and mental defect, has been added to this section as a proviso; but the said provision has been slightly changed so as to clarify its meaning and meet recent court decisions tending to modify the principle, upon which provisions of this kind in the immigration law have heretofore been based, that on medical questions the

opinions of doctors as against that of laymen should prevail. Of course practical questions should be determined by the immigration officials, but questions of a purely medical nature must be determined by members of the medical profession.

The question propounded to the undersigned was whether he knew of any other "recent court decisions" (i. e. decisions antedating the year 1917 to which this language could refer), except *Ex parte Joyce*, 212 F 282, and *Billings* v. *Sitner*, 228 F 315.

The implication of this question was that, as the court below held, the changed language of section 17 of the 1917 Act, as compared with section 10 of the 1907 Act, was intended to overrule *Ex parte Joyce* and *Billings* v. *Sitner*.

Renewed search has revealed the following two cases:

(1) *In re Madeiros, Lewis* v. *Billings*, District Court, Mass., August 3, 1914, 225 F. 90, by Morton, D. J. (91):

In this case an alien was excluded under the 1907 law because of a physical defect of a nature which might impair his ability to earn a living. The court upheld an exclusion decision, holding:

> "(1) No one of the three medical certificates which appear in the record states explicitly and categorically that the applicant is afflicted with a defect which may impair his ability to earn a living. In re Felix Petkas, 214 Fed. 978, 133 C. C. A. 274, June 24, 1914. But I think that, fairly construed, that is what Dr. Grubb's certificate, and Dr. Safford's letter or certificate, dated February 7, 1914, mean. In proceedings of this character, in which substance rather than form, and essential justice rather than

technicalities, are to be regarded, I do not think it can properly be held that the certificates were so defective that action based upon them was illegal and void."

It is apparent that in the above case the alien was excluded upon the finding of the Board of Special Inquiry that the physical defect of the alien was of such nature that the alien was unable to earn a living. The Massachusetts court sanctioned the exclusion, although the medical certificates did not state that the alien's ability to earn a living was impaired.

A similar situation underlies *U. S.* v. *Petkas*, 1914, C. A. 1st. Circ., 214 F. 978.

The undersigned respectfully contends that section 17 of the 1917 Act intended to modify the law established by the *Madeiros* case and by the *Petkas* case quoted in the *Madeiros* case. Congress wanted to take away from the Boards of Special Inquiry the power to find that a physical defect disabled an immigrant to earn a living, unless the certificate of the government physicians contained a finding to this effect. The 1907 Act,[1] like the 1917 Act,[2] excludes

---

[1] Immigration Act of February 20, 1907, Chapt. 1134, 59th Congr., United States Statutes at Large.

"Sec. 2. That the following classes of aliens shall be excluded from the United States: All idiots, imbeciles, feeble minded persons * * * persons not comprehended within any of the foregoing excluded classes who are found to be and are certified by the examining surgeon as being mentally or physically defective, such mental or physical defect being of a nature which may affect the ability of such alien to earn a living; * * *"

[2] Sec. 3 of the Immigration Act of 1917—8 U. S. C. 136 (d) see page 39 of Petition for Certiorari and Brief in support.

aliens having such physical defects as may affect the ability of such alien to earn a living; but while under the *Madeiros* decision of Judge Morton the certificate of the surgeons did not have to contain a reference to the alien's earning ability, and this could be established by the laymen sitting in the Board of Special Inquiry, section 17 of the 1917 Act makes clear that the government doctors have to determine this question first and that the Board of Special Inquiry must not make a finding that is not "based" on such certificate of the doctors.

The rules of the Surgeon General, issued pursuant to authority contained in 8 U. S. C. 152 therefore now provide (see 42 C. F. R. 34.8, as amended in 1917):

> "The certificate * * * shall state the nature and extent of the physical defect, whether it is chronic or permanent, and the extent to which it is likely to render the alien incapable of pursuing a vocation or profession for which he has particular training or experience, or, if he has no such vocation or profession, incapable of performing ordinary physical or manual work.

To sum up:

The court below erred in holding that the language of the Senate Report referred to *Ex parte Joyce* and *Billings* v. *Sitner*. It is manifest that the Senate Report overruled the *Madeiros* and *Petkas* decisions, *supra*.

This being so, it is proved that *Billings* v. *Sitner* is still good law under the 1917 Act. If an alien is certified by the government surgeons as mentally defective, he must have the right to bring in his experts to prove his sanity. The

Board of Special Inquiry has then to decide the case, weigh the evidence, and hold either with the government surgeons or with the medical experts furnished by the alien. In doing so, laymen will not overrule physicians, but decide which medical testimony they believe more trustworthy.

April 22, 1949.

Respectfully submitted,

GUNTHER JACOBSON,
Attorney for Petitioner.